

**COMMONWEALTH OF MASSACHUSETTS
CIVIL SERVICE COMMISSION**

SUFFOLK, ss.

One Ashburton Place – Room 503
Boston, MA 02108
(617)727-2293

JERRY SANTIAGO,
Appellant

v.

D1-16-192

WORCESTER HOUSING AUTHORITY,
Respondent

Appearance for Appellant:

Sal Romano
Mass. Laborers’ District Council
226 South Main Street
Providence, RI 02903

Appearance for Respondent:

Nicholas Anastasopoulos, Esq.
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Westborough, MA 01581

Commissioner:

Christopher C. Bowman

DECISION

The Appellant, Jerry Santiago (Mr. Santiago), pursuant to G.L. c. 31, §§ 41-45 and G.L. c. 121B, § 29, filed the instant appeal with the Civil Service Commission on November 18, 2016, contesting the decision of the Worcester Housing Authority (WHA), to terminate his employment as a custodian. A pre-hearing conference was held at the offices of the Commission on December 13, 2016 and a full hearing was held at the offices of the WHA in Worcester on February 15, 2017.¹ The hearing was digitally recorded and the parties received a CD of the proceeding.² For the reasons stated herein, the appeal is denied.

¹ The Standard Adjudicatory rules of Practice and Procedures, 810 CMR §§ 1.00, *et seq.*, apply to adjudications before the Commission, with G.L. Chapter 31, or any Commission rules, taking precedence.

² If there is a judicial appeal of this decision, the plaintiff in the judicial appeal would be obligated to supply the court with a transcript of this hearing to the extent that he/she wishes to challenge the decision as unsupported by the

FINDINGS OF FACT

Fourteen (14) exhibits were entered into evidence at the hearing. Based on these exhibits, the testimony of the following witnesses:

Called by the WHA:

- Michael Reynolds, Maintenance Supervisor, WHA;
- Alex Corrales, Executive Director, WHA;

Called by Mr. Santiago:

- Jerry Santiago, Appellant;

and taking administrative notice of all matters filed in the case; pertinent statutes, regulations, policies, stipulations and reasonable inferences from the credible evidence, a preponderance of the evidence establishes the following.

1. Mr. Santiago is thirty-eight (38) years old and has two (2) children. He grew up living in a housing complex in the WHA and began working for the WHA while he was in high school. After high school, he became an apprentice for the WHA and, since, 2001, has been employed by the WHA as a groundskeeper or custodian. (Testimony of Mr. Santiago)
2. The mission of the WHA, which includes 4,000 residential units, is to offer its residents a clean, safe and well-maintained living environment in which to live and raise their families. (Testimony of Mr. Reynolds and Administrative Notice: http://www.worcester-housing.com/mission_statement.html)
3. Mr. Santiago has a significant history of prior discipline including four (4) counseling memos; three (3) oral warnings; eight (8) written warnings and seven (7) suspensions, two of

substantial evidence, arbitrary and capricious, or an abuse of discretion. If such an appeal is filed, this CD should be used to transcribe the hearing.

which (a thirty-day suspension and a one-day suspension) involved offenses similar to the one which is the subject of the instant appeal. (Exhibit 6)

4. In order to perform their duties, custodians at the WHA are issued keys and access cards, including master keys, which provide access to hundreds of residential units, other buildings and secure areas involving various WHA systems. (Testimony of Mr. Reynolds)
5. Custodians, including Mr. Santiago, who are issued keys by the WHA, are required to sign a “Key Acknowledgment and Protocol” form which states in part: “By accepting these keys, I understand that I am responsible for the safe keeping and proper usage of these keys, access cards and other devices ...” Mr. Santiago signed a Key Acknowledgment and Protocol Form in 2010. (Exhibit 7)
6. The prior thirty (30)-day suspension involved an incident in April 2015 in which Mr. Santiago lost twenty-four WHA keys and waited at least one week before informing the WHA of the lost keys, and only did so when he was required to turn in his keys by his supervisor. (Exhibit 7)
7. In addition to being suspended for thirty (30) days for the above-referenced offense, Mr. Santiago was not permitted to work unsupervised overtime. In January 2016, the WHA’s then-Executive Director, Raymond Mariano, agreed to allow Mr. Santiago to resume working unsupervised overtime with the proviso that Mr. Santiago would be “issued an MS key and access card that [he] will be allowed to keep. All other keys must be signed out and returned, as is the current practice.” (Exhibit 13)
8. Mr. Santiago was the only full-time WHA custodian that was required to sign out and return keys each day, as opposed to keeping them in his possession when the work day ended. (Testimony of Mr. Reynolds)

9. The prior one (1)-day suspension was the result of an incident that occurred in June 2016, in which Mr. Santiago lost one of his wallets which contained his WHA issued access card to the buildings. The wallet was recovered and returned to the WHA. When the WHA returned the wallet to Mr. Santiago, he was unaware that he had lost it (along with the access card). (Exhibit 8 and Testimony of Mr. Santiago)
10. Then-outgoing WHA Executive Director Mariano left it to his successor, current WHA Executive Director Alex Corrales, to determine what discipline should be issued to Mr. Santiago regarding the June 2016 incident. (Testimony of Mr. Corrales)
11. Mr. Corrales has worked for the WHA for seventeen (17) years and has worked in various capacities, including three (3) years as the WHA's Assistant Executive Director. He assumed his Executive Director duties on July 1, 2016. (Testimony of Mr. Corrales)
12. Although Mr. Corrales believed that the June 2016 incident, coupled with Mr. Santiago's lengthy disciplinary history, warranted termination, he considered Mr. Santiago's request for a "fresh start" and agreed to limit the discipline to a one (1)-day suspension, which was issued in July 2016. (Testimony of Mr. Corrales and Exhibit 8)
13. The July 2016 suspension letter issued to Mr. Santiago stated in part: "This is a reminder that you must take special care to ensure that all access cards and keys are kept in a secure fashion. Please be advised that any future loss or failure to secure or report the loss of your access card and/or keys, and/or any additional job deficiencies in the future will result in termination." (Exhibit 8)
14. In or around July 2016, Mr. Santiago, as part of a normal rotation, was reassigned to "Area 1" which includes 1100 residential units. His direct supervisor was Michael Reynolds, a

maintenance supervisor who has worked for the WHA for eighteen (18) years. (Testimony of Mr. Reynolds)

15. Consistent with the prior directive, memorialized by the former Executive Director in writing in January 2016, Mr. Santiago was still required to sign keys in and out each day, except for the “MS access card” which he could keep permanently. (Exhibit 13)

16. Aware of Mr. Santiago’s recent issues involving the loss of keys, Mr. Reynolds advised Mr. Santiago that he should only check out one key at a time and then return it when the job requiring the use of that key was completed. (Testimony of Mr. Reynolds)

17. Mr. Reynolds also advises all employee to try and attach the WHA keys to their own personal keys while in their possession to prevent the WHA key from getting lost. (Testimony of Mr. Reynolds)

18. On November 1, 2016, after receiving his work assignments to remove air conditioning units from various units, Mr. Santiago checked out three (3) WHA keys. (Exhibit 12 and Testimony of Mr. Santiago)

19. Sometime shortly after noon time, Mr. Santiago realized that he had lost one (1) of the three (3) keys and notified Mr. Reynolds. (Testimony of Mr. Santiago)

20. Mr. Reynolds asked Mr. Santiago why he checked out more than one (1) key. Mr. Santiago said something to the effect that he did it to expedite the job. (Testimony of Mr. Reynolds)

21. The lost key allowed access to two hundred twelve (212) residential units. (Testimony of Mr. Reynolds) The cost of replacing the lock “cores” for these 212 units would be in excess of \$10,000. (Testimony of Mr. Reynolds and Mr. Corrales)

22. Mr. Reynolds instructed Mr. Santiago to search his person, his vehicle and re-trace his steps, including re-accessing each of the residential units he had visited that morning in order to find the key. (Testimony of Mr. Reynolds and Mr. Santiago)
23. When Mr. Santiago was unable to find the key, Mr. Reynolds assigned twelve (12) WHA employees to search for the lost key over a three (3)-hour period. By the end of the work day, the search was called off. (Testimony of Mr. Reynolds)
24. As a precaution, Mr. Corrales contacted the Worcester Police Department and the WHA's security team and asked that the 212 units be put under additional surveillance. (Testimony of Mr. Reynolds)
25. On November 2, 2016, Mr. Corrales placed Mr. Santiago on paid administrative leave and informed him of a scheduled disciplinary hearing, to be held on November 8th, to determine if Mr. Santiago should be terminated. (Exhibit 9)
26. Approximately five (5) days later, a WHA resident found the key and turned it into the WHA. The resident indicated that she found the key "next to the mailbox" but it wasn't clear which mailbox. (Testimony of Mr. Reynolds)
27. On November 8, 2016, Mr. Corrales, in his capacity as Appointing Authority under G.L. c, 31, s. 41, conducted a disciplinary hearing, which was attended by Mr. Santiago, two (2) of his union representatives, counsel for the WHA and three (3) WHA personnel. (Exhibit 11)
28. Effective November 10, 2016, Mr. Santiago was terminated from his employment with the WHA. The November 9th termination letter from Mr. Corrales states in part: "Based on my review of the evidence, in which I note that this is your third incident of losing keys/access card in the recent 1 ½ years, including the most recent suspension which contained a final

warning, and your record of discipline, I conclude that you must be terminated from your position with the Worcester Housing Authority ...” (Exhibit 11)

Applicable Law

The Commission’s authority in this matter is drawn from G.L. c. 121B, § 29 which provides, in relevant part, that:

“No employee of any housing authority, except an employee occupying the position of executive director, who has held his office or position, including any promotion or reallocation therefrom within the authority for a total period of five years of uninterrupted service, shall be involuntarily separated therefrom except subject to and in accordance with the provisions of sections forty-one to forty-five, inclusive, of said chapter thirty-one to the same extent as if said office or position were classified under said chapter.”

G.L. c. 31, § 43, provides:

“If the commission by a preponderance of the evidence determines that there was just cause for an action taken against such person it shall affirm the action of the appointing authority, otherwise it shall reverse such action and the person concerned shall be returned to his position without loss of compensation or other rights; provided, however, if the employee by a preponderance of evidence, establishes that said action was based upon harmful error in the application of the appointing authority’s procedure, an error of law, or upon any factor or conduct on the part of the employee not reasonably related to the fitness of the employee to perform in his position, said action shall not be sustained, and the person shall be returned to his position without loss of compensation or other rights. The commission may also modify any penalty imposed by the appointing authority.”

An action is "justified" if it is "done upon adequate reasons sufficiently supported by credible evidence, when weighed by an unprejudiced mind; guided by common sense and by correct rules of law." Commissioners of Civil Service v. Municipal Ct. of Boston, 359 Mass. 211, 214 (1971); Cambridge v. Civil Service Comm’n, 43 Mass.App.Ct. 300, 304, rev.den., 426 Mass. 1102, (1997); Selectmen of Wakefield v. Judge of First Dist. Ct., 262 Mass. 477, 482 (1928). The Commission determines justification for discipline by inquiring, "whether the employee has been guilty of substantial misconduct which adversely affects the public interest by impairing the

efficiency of public service." School Comm. v. Civil Service Comm'n, 43 Mass.App.Ct. 486, 488, rev.den., 426 Mass. 1104 (1997); Murray v. Second Dist. Ct., 389 Mass. 508, 514 (1983)

The Appointing Authority's burden of proof by a preponderance of the evidence is satisfied "if it is made to appear more likely or probable in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal notwithstanding any doubts that may still linger there." Tucker v. Pearlstein, 334 Mass. 33, 35-36 (1956).

"The commission's task...is not to be accomplished on a wholly blank slate. After making its de novo findings of fact . . . the commission does not act without regard to the previous decision of the [appointing authority], but rather decides whether 'there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the appointing authority made its decision'", which may include an adverse inference against a complainant who fails to testify at the hearing before the appointing authority. Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006). See Watertown v. Arria, 16 Mass.App.Ct. 331, 334, rev.den., 390 Mass. 1102 (1983) and cases cited.

Under Section 43, the Commission is required "to conduct a de novo hearing for the purpose of finding the facts anew." Falmouth v. Civil Service Comm'n, 447 Mass. 814, 823 (2006) and cases cited. The role of the Commission is to determine "whether the appointing authority has sustained its burden of proving that there was reasonable justification for the action taken by the appointing authority." Cambridge v. Civil Service Comm'n, 43 Mass.App.Ct. 300, 304, rev.den., 426 Mass. 1102, (1997). See also Leominster v. Stratton, 58 Mass.App.Ct. 726, 728, rev.den., 440 Mass. 1108, 799 N.E.2d 594 (2003); Police Dep't of Boston v. Collins, 48 Mass.App.Ct. 411, rev.den. (2000); McIsaac v. Civil Service Comm'n, 38 Mass App.Ct. 473, 477 (1995); Town of Watertown v. Arria, 16 Mass.App.Ct. 331, 390 Mass. 1102 (1983).

Analysis

Mr. Santiago has a unique connection to the Worcester Housing Authority, having spent his entire life living and/or working at the WHA. Throughout these proceedings, he appeared, at all times, to be sincerely polite and respectful.

Unfortunately for Mr. Santiago, he has, since 2004, amassed an eye-popping disciplinary history, most of which relates to performance-related issues, the most serious and consequential of which occurred beginning in April 2015 when he lost twenty-four (24) keys, including many master keys to hundreds of residential units. His actions potentially put the safety of hundreds of WHA residents in jeopardy, in direct contradiction of the WHA's mission. Despite this serious transgression, the WHA, apparently because of his long work history at the WHA, chose not to terminate Mr. Santiago, and instead imposed a 30-day suspension along with restrictions limiting his access to keys to business hours.

Several months later, in order to allow Mr. Santiago to resume being eligible for overtime, the WHA lessened those restrictions, allowing Mr. Santiago to have a master pass that allowed him access to common areas of buildings after business hours. Only three (3) months after having this privilege restored, Mr. Santiago unknowingly dropped his wallet which contained the master access card. He was apparently unaware that he had lost this pass until his wallet was found and returned to the WHA. Again, the WHA chose not to terminate Mr. Santiago, but, under a new Executive Director, imposed a short, one (1)-day suspension, along with continued restriction to most master keys during business hours only.

In July 2016, when Mr. Santiago began working in Area I, his supervisor, Mr. Reynolds, aware of his past problems losing keys, advised Mr. Santiago to only check out one key at a time. It is clear to me that this guidance was not punitive, but, rather, a sincere attempt by Mr.

Reynolds to help prevent Mr. Santiago from losing any further keys. On November 1, 2016, Mr. Santiago ignored that guidance and checked out three (3) keys at the same time. Hours later, he, once again, lost one of these three master keys that allowed access to over 200 residential units. As noted in the findings, a dozen employees were directed away from their normal duties to search for the key for over three (3) hours and extra security and patrols occurred to ensure the safety and wellbeing of the residents who lived in those units. Five days later, a resident apparently found the key next to a mail box and returned the key.

By (repeatedly) failing to ensure the safe keeping of these master keys, Mr. Santiago compromised the safety and wellbeing of WHA residents, which constitutes substantial misconduct adversely affecting the public interest. For this reason, the WHA had just cause to impose discipline upon Mr. Santiago.

Having determined that it was appropriate to discipline Mr. Santiago, the Commission must determine if the WHA was justified in the level of discipline imposed, which, in this case, was termination.

The Commission is guided by “the principle of uniformity and the ‘equitable treatment of similarly situated individuals’ [both within and across different appointing authorities]” as well as the “underlying purpose of the civil service system ‘to guard against political considerations, favoritism and bias in governmental employment decisions.’ ” Falmouth v. Civil Service Comm’n, 447 Mass. 814, 823 (2006) and cases cited. “The ‘power accorded the commission to modify penalties must not be confused with the power to impose penalties ab initio, which is a power accorded the appointing authority.’ ”

First, there is no evidence that the WHA’s decision here was motivated by any political considerations, favoritism or bias. Second, my findings do not differ from those made by the

WHA. Third, Mr. Santiago's lengthy disciplinary history more than justifies the most severe discipline possible here: termination.

For these reasons, Mr. Santiago's appeal under Docket No. D1-16-192 is hereby *denied*.

Civil Service Commission

/s/ Christopher Bowman

Christopher C. Bowman

Chairman

By a vote of the Civil Service Commission (Bowman, Chairman; Camuso, Ittleman, Stein and Tivnan, Commissioners) on March 2, 2017.

Either party may file a motion for reconsideration within ten days of the receipt of this Commission order or decision. Under the pertinent provisions of the Code of Mass. Regulations, 801 CMR 1.01(7)(l), the motion must identify a clerical or mechanical error in this order or decision or a significant factor the Agency or the Presiding Officer may have overlooked in deciding the case. A motion for reconsideration does not toll the statutorily prescribed thirty-day time limit for seeking judicial review of this Commission order or decision.

Under the provisions of G.L.c. 31, § 44, any party aggrieved by this Commission order or decision may initiate proceedings for judicial review under G.L.c. 30A, § 14 in the superior court within thirty (30) days after receipt of this order or decision. Commencement of such proceeding shall not, unless specifically ordered by the court, operate as a stay of this Commission order or decision. After initiating proceedings for judicial review in Superior Court, the plaintiff, or his / her attorney, is required to serve a copy of the summons and complaint upon the Boston office of the Attorney General of the Commonwealth, with a copy to the Civil Service Commission, in the time and in the manner prescribed by Mass. R. Civ. P. 4(d)

Notice to:

Sal Romano (for Appellant)

Nicholas Anastasopoulos, Esq. (for Respondent)